U.S. Department of Homeland Security
20 Mass, Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: MIAMI DISTRICT OFFICE Date: NOV 10 2004

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Ellen C. Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). A subsequent motion to reopen before the AAO was dismissed. The matter is now before the AAO on a motion to reconsider. The motion will be granted and the prior decisions of the district director and AAO will be affirmed.

The record reflects that the applicant is a native and citizen of Nicaragua. The applicant was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I). The record reflects that the applicant is the mother of two U.S. citizen children, aged 9 and 13. She is also the mother of three other children born in Nicaragua, aged 17, 18, and 21. The eldest, [redacted] and the 18-year-old, [redacted] appear to be dependent riders on the applicant's request to adjust status to that of a lawful permanent resident under section 202 of the Nicaraguan and Central American Relief Act (NACARA) and were paroled into the United States on or about May 30, 2000 in order to pursue adjustment of status.

The district director found that the applicant had failed to establish extreme hardship to her U.S. citizen children and that she did not merit a favorable exercise of discretion, and denied the application accordingly. *Decision of the District Director* (May 3, 2001). The decision of the district director was affirmed on appeal. *Decision of the AAO* (August 21, 2001). A motion to reopen was dismissed for failure to raise new facts, pursuant to 8 C.F.R. § 103.5(a)(4). *Decision of the AAO* (August 13, 2003).

The regulations governing these proceedings, 8 C.F.R. § 103.5(a), state in pertinent part:

> (2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .
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> (3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service [now USCIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In the present motion, the applicant submits new evidence that she is undergoing treatment for cancer and states that her husband has kidnapped two of her children and she hasn't seen them since 1999. The motion is styled as a motion to reconsider but it meets only the requirements of a motion to reopen, and is treated as such. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in pertinent part:

> (i) In general.—Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the elements of—

> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to committ such a crime, . . .
> . . .
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if—
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> (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to aprison or correction institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or
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> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was actually carried out.

8 U.S.C. § 1182(a)(2)(A). The district director based the finding of inadmissibility under this section on the applicant's 1996 conviction for aggravated battery with great bodily harm and battery in violation of Florida Statutes 784.045(1)(a)1 and 784.03. *Decision of the District Director* (May 3, 2001) at 2. Aggravated battery under Florida Statute 784.045 is a second-degree felony for which the maximum penalty is not more than 15 years imprisonment. Fla. Stat. Ann. § 775.082(3)(b) (West 2004). The applicant does not contest the district director's determination of inadmissibility. Section 212(h) of the Act provides, in pertinent part:

> The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . if—
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> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that—
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> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
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> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
>
> (iii) the alien has been rehabilitated; or
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> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted

> for permanent residence if it is established to the satisfaction of the [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien;
>
> . . . and
>
> (2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. . .

8 U.S.C. § 1182(h). As less than 15 years have passed since the applicant's conviction, a section 212(h) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. INA § 212(h)(1)(B). Hardship to the alien herself is not a permissible consideration under the statute.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

The applicant submitted in connection with the motion new evidence showing that she was diagnosed with cervical cancer and is undergoing treatment. As of September 2003, her prognosis is characterized as "guarded" or "poor." *Letter of Aaron Wolfson, MD* (September 5, 2003); *Letter of Marsha Hunt, ARNP, Gynecologic Oncology, Jackson Memorial Hospital* (September 9, 2003). The question raised by the new evidence is whether the applicant's health condition alone, or in combination with prior evidence in the

record, amounts to extreme hardship to the applicant's U.S. citizen children if the applicant is refused admission.

The AAO previously noted that the record is unclear as to whether the applicant's two young children reside with her. *Decision of the AAO* (August 13, 2003), at 2. She claimed her two U.S. citizen children as dependents on her 1997 tax return, which she filed as head of household and without her husband. The same year, she requested cash, food and medical assistance for herself and two U.S. citizen children from the State of Florida Health and Rehabilitative Services. Her 1998 tax return, also filed as head of household and without her husband, shows that she claimed only one of her U.S. citizen children as a dependent living with her. The record has not been supplemented with any further tax returns.

The record does not contain information to show the immigration status of her husband, a native of Mexico, or his whereabouts. *Dade County Marriage Certificate* (October 30, 1992). A search of CIS records failed to produce a matching record for his biographical data. The U.S. citizen children's birth certificates cite the applicant's husband as the father of her two U.S. citizen children, born in 1995 (Guadalupe) and 1991 (Imelda). The applicant has previously stated that she has been separated from her husband since 1996, and she is "the sole support of my daughters, both financially and emotionally." *Affidavit of Zitha Romero* (April 26, 2001). She further stated, "I take very good care of my daughters, they are my whole life, their welfare is my main concern. They are well taken care of, they lack for nothing, and I do not wish to raise them in a country they know nothing about [Nicaragua] . . .." *Id.* In an additional sworn statement in these proceedings, the applicant stated, "I have two U.S. citizen children . . . I am married and have two children, who need my emotional and financial support. . . . I work very hard, take care of my family, pay my taxes, and support my family both emotionally and financially. I do not wishes [sic] to see my family separated . . . I am married to Baltazar Galaviz, and although we are separated, I have no wish to separate him from his children, and they need him as much." *Affidavit of Zitha Romero* (March 23, 2001).

The applicant now states in the instant proceedings that her husband "kidnapped two of my children since 1999 and to this date I have not had any information on their whereabouts." *Letter of Zitha Maria Romero* (September 9, 2003). This appears to be the first time the applicant has raised this claim and there is no evidence submitted in support of this contention.

The AAO notes that, in these proceedings, "the burden of proof shall be upon [the applicant] to establish that he is not inadmissible under any provision of [the] Act . . .." INA § 291, 8 U.S.C. § 1361. The BIA has held, where the applicant is "responsible for ambiguities in the record, . . . it is incumbent upon [the applicant] to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent *competent objective evidence* pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho,* 19 I&N Dec. 582, 591-592 (BIA 1988) (emphasis added). The present record contains a significant allegation that her two U.S. children were kidnapped by their father, which is plainly inconsistent with the applicant's own prior statements. The applicant has failed to establish the whereabouts of her two U.S. citizen children, their father, and the extent of her role and their father's role in their lives. CIS is not insensitive to the applicant's documented serious medical condition and its effect on her family. Nevertheless, an accurate assessment of the hardship her children would experience if the applicant were refused admission cannot be made on this record.

The AAO therefore finds that the applicant failed to establish extreme hardship to a qualifying relative as required under INA § 212(h), 8 U.S.C. § 1186(h). Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.